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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 102

JOHN WILLIAM SHAPARD,
*Petitioner,*

VERSUS

STATE OF OKLAHOMA,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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July, 1968

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### STATEMENT OF CASE

Petitioner, John William Shapard, was charged along with six other young men on July 8, 1965, by preliminary information with having forcibly raped a 15 year old girl in Oklahoma County, State of Oklahoma. After a three day preliminary examination, September 7-9, 1965, the charge was dismissed against one of the defendants, while the remaining six, including Petitioner, were bound over for trial.

The trial was set for November 8, 1965, in the District Court for Oklahoma County, State of Oklahoma. However, upon defendant's motion, a continuance and a change of venue were granted.

The trial of Petitioner, after severance of the defendants, began on November 16, 1965, in Canadian County, State of Oklahoma. The *voir dire* examination of the jury was conducted on November 16 and 17. On November 26, 1965, the jury returned a verdict of guilty and assessed the punishment at five years in the State Penitentiary. Judgment and Sentence was pronounced on December 10, 1965. The Oklahoma Court of Criminal Appeals affirmed said Judgment on November 20, 1967, with petitions for rehearing denied on March 4 and 15, 1968.

Four of the other defendants entered pleas of guilty to the same charge and were given five-year sentences with two years suspended. Two of the defendants have been released on parole while the other two remain in the penitentiary because of parole violations. Petitioner remains free on bond.

## I.

## PETITIONER WAS NOT DENIED DUE PROCESS BY FAILURE TO GRANT A FURTHER CONTINUANCE OR SECOND CHANGE OF VENUE BASED ON CONTINUING PUBLICITY.

It will be noted that Petitioner was granted a continuance and change of venue from Oklahoma County to Canadian County. It is the failure of the trial court to grant an additional continuance and venue change that Petitioner urges was a denial of due process.

The Oklahoma Court of Criminal Appeals in *Shapard* v. *State,* Okla. Cr., 437 P.2d 565, 578, upheld the trial court's denial of a further continuance or change of venue based on pretrial publicity. The Court of Criminal Appeals

relied upon the holding in *United States* v. *Hoffa,* 156 F.Supp. 495, 499 (Dist. of Col. 1957), wherein that Court held:

> "The mere fact that there has been widespread adverse pretrial publicity about the defendant does not, by itself, establish reasonable probability that defendant cannot obtain a fair and impartial jury at criminal trial."

It will be noted that Petitioner's trial took place before this Court's decision in *Sheppard* v. *Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600. However, it is clear that the "totality of circumstances" in the case at bar does not compare with the "carnival atmosphere" attacked in *Sheppard* v. *Maxwell, supra.* The trial below was not televised nor was there interference with the decorum of the court by the news media. Petitioner's jury was sequestered and fully admonished to avoid outside influences. Petitioner was not subject to a pretrial televised interview and was at all times amply supported by capable counsel of his own choice.

Accordingly, there is no substance to the argument that Petitioner was denied due process by failure to grant another continuance and venue change simply because publicity about the case continued to the trial date. *United States* v. *Barnes,* 383 F.2d 287 (6th Cir. 1967); *United States* v. *Ragland.* 375 F.2d 471 (2d Cir. 1967); *United States* v. *Armone,* 363 F.2d 385 (2d Cir. 1966); *United States* v. *Andreadis,* 366 F.2d 423 (2d Cir. 1966); *Welch* v. *United States,* 371 F.2d 287 (10th Cir. 1966).

## II.

**THE PETITIONER WAS NOT DENIED DUE PROCESS BY FAILURE TO EMPANEL AN IMPARTIAL JURY.**

It will be noted that the selection of the jury took two days during which time they were questioned extensively, particularly regarding publicity about the case. The opinion of the Oklahoma Court of Criminal Appeals in *Shapard* v. *State, supra,* on pages 579-592, takes considerable time in reviewing the *voir dire* examination of the jury.

The Oklahoma Court of Criminal Appeals noted the holding of this Court in *Irvin* v. *Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, to the effect that:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. * * * It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

The Oklahoma Court of Criminal Appeals then held that the jury empaneled was impartial and that Petitioner's trial was distinguishable from the cases of *Irvin* v. *Dowd, supra, Sheppard* v. *Maxwell, supra,* and *Estes* v. *Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, in the following particulars:

> "In the instant case (a) None of the jurors were challenged for cause; (b) All of the jurors unequivocally stated that they would base their verdict on the evidence presented and lay aside any impression or opinion which they might have formed as a result of what they had read or heard discussed; (c) Defendant was represented by several capable attorneys of his own choice and was allowed to extensively examine

the jurors called; and (d) The punishment fixed by the jury was five years imprisonment, one-third of the maximum sentence which could be imposed." (*Shapard* v. *State, supra,* at 591).

It will also be noted that the allegation that three jurors "harbored a fixed opinion" is based upon affidavits from private investigators who interviewed the jurors almost a year after the trial and do not purport to be statements of the jurors. Said affidavits were stricken by the Oklahoma Court of Criminal Appeals since they attempted to impeach the verdict of the jury contrary to the law of Oklahoma.

## III.

**PETITIONER WAS NOT DENIED A FAIR TRIAL CONSISTENT WITH DUE PROCESS BY STATEMENTS AND ACTIONS OF THE PROSECUTING AUTHORITIES.**

It is the apparent contention of the Petitioner that newspaper articles purporting to report statements of the county attorney and his assistants prejudiced his case since some of the items of evidence were not introduced at the trial. In short, it is urged that the county attorney poisoned the public mind preventing a fair trial.

As regards comments by the county attorney on events that happen such as a medical examination, this is largely a matter within the discretion of the prosecuting authorities as to whether or not it should be submitted in evidence. Petitioner submits that the medical examination tended to indicate that no rape took place. However, it is to be noted that no medical examination or medical evidence was admitted whatsoever.

We would also submit that any "disciplinary measures" as suggested in *Sheppard* v. *Maxwell, supra,* would be a matter for the appropriate authorities which would be the Oklahoma Bar Association. Even if "disciplinary measures" against the county attorney were urged it would not mean that a defendant is entitled to a new trial where defendant received a fair trial.

Again we urge that the important question is not the lack of discretion by the county attorney, but rather whether a fair and impartial jury was empaneled which rendered a verdict on the evidence and not on the basis of newspaper articles regarding the county attorney. Pretrial publicity in and of itself is not conclusive of an unfair trial. *United States* v. *DePugh,* 266 F.Supp. 435 (W.D. Mo. 1967). As held in *United States* v. *Hoffa, supra,* at 500, the question is whether on voir dire a fair and impartial jury can be selected.

## IV.

## PETITIONER WAS NOT DENIED A PRELIMINARY EXAMINATION BECAUSE THE EXAMINING MAGISTRATE FAILED TO CALL AND EXAMINE ALL THE DEFENDANT'S WITNESSES.

The Oklahoma Constitution, Article 2, Section 17,

> "No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination."

The purpose and sufficiency of the preliminary examination is well established in Oklahoma. The Oklahoma Court of Criminal Appeals held in *Melchor* v. *State,* Okla. Cr., 404 P.2d 63:

> "A preliminary hearing is not a trial, since it is not conducted to determine the guilt of accused, but only the two issues—was a crime committed, and is there probable cause to believe the accused committed it."

The authority in support of this point is abundant: *State* v. *Harris,* 44 Okla. Cr. 116, 279 Pac. 925; *McCurdy* v. *State,* 39 Okla. Cr. 319, 264 Pac. 925; *McAllister* v. *State,* 97 Okla. Cr. 167, 260 P.2d 454; *Taylor* v. *State,* 96 Okla. Cr. 1, 247 P.2d 749.

Petitioner argues that all of a defendant's witnesses must be heard at a preliminary examination. No authority is cited to this effect and defendant rests his assertion on 22 O.S. 1961, § 259, which provides the order of calling witnesses at a preliminary examination with defendant's witnesses examined after the State's witnesses.

Petitioner states on page 22 of his Petition for Writ of Certiorari:

> "The [Oklahoma] Court of Criminal Appeals in its opinion stated: 'I feel that the statute [22 O.S. 1961, § 259] should be complied with, or repealed. * * *' "

It should be noted that this is not the opinion of the Oklahoma Court of Criminal Appeals, but rather it is a quote from a concurring opinion written by and agreed upon by only one of the three judges (R. 123).

It was, however, the opinion and holding of the Court of Criminal Appeals in *Shapard* v. *State, supra,* at page 574, that:

> "It is significant that the defendant did not attempt to call any of the witnesses on the trial whose testimony he now urges was vital to his defense at the

preliminary hearing. It is thus clear that the defendant did not consider the testimony of these witnesses material to his defense and we are of the opinion and therefore hold, that where evidence presented at preliminary hearing before a magistrate is sufficient to establish that a crime has been committed and there is probable cause to believe the defendant guilty, the failure of the magistrate to allow the defendant to offer testimony of witnesses whose testimony is not material to the defense, does not constitute reversible error."

Petitioner urges without citing any authority that the preliminary examination in Oklahoma is a critical stage of the proceedings and that it is defendant's right to be "confronted by his witnesses" (Petition for Certiorari, p. 23). This argument was rejected below. *Shapard* v. *State, supra,* at p. 574.

It is apparent that the preliminary examination was not in the instant case a "critical stage" as contemplated in *Hamilton* v. *Alabama,* 368 U.S. 52, 7 L.Ed.2d 114, 82 S.Ct. 157. Petitioner was represented by a battery of counsel at the preliminary examination where he had the right of confronting the witness against him. Petitioner did not forfeit any possible defense at the preliminary examination. Nor was any part of the transcript at the preliminary examination used to convict Petitioner. Indeed, Petitioner had the right and opportunity, which he did not exercise, to call the very witness not called at the preliminary examination.

Accordingly, we urge that there is no conflict of decisions presented in this assignment of error, nor is this a matter of sufficient substance to deny Petitioner due process of law or prejudice his cause.

## CONCLUSION

Upon a review of the decision of the Oklahoma Court of Criminal Appeals in *Shapard* v. *State, supra,* it will be seen that the reasons asserted by Petitioner in requesting a Writ of Certiorari have all been fully answered below consistent with the decisions of the United States Supreme Court and the Oklahoma Court of Criminal Appeals. Accordingly, there being no conflict of decisions or questions of importance the State of Oklahoma respectfully requests that said Petition for Writ of Certiorari be denied.

Respectfully submitted,

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July, 1968